HIGH COURT OF CHHATTISGARH, BILASPUR

(18)
(17)

Criminal Appeal No. 26 of 2006

Appellant	Shankar @ Tunu s/o Sukdev, aged about 25 years, resident of village Kumharras Kukanar, P.S. Kukanar, Distt. South Bastar, Dantewara (C.G)
	Vs.
RESPONDENT	State of Chhattisgarh through P.S. Kukanar, Distt. Dantewara (South Bastar) Distt. Bastar (C.G)

Criminal Appeal No.27/2006

Appellant	Santu @ Motu s/o Sukdeo, aged about 22 years, resident of village Kumharras Mararpara, Kukanar, P.S. Kukanar, Distt. South Bastar, Dantewara (C.G)
	Vs.
RESPONDENT	State of Chhattisgarh through P.S. Kukanar, Distt. Dantewara (South Bastar) Distt. Bastar (C.G)

Criminal Appeal No.28/2006

Appellant	Sukdev @ Gonga, s/o Sudu, r/o village Kumharras Mararpara, Kukanar, P.S. Kukanar, Distt. South Bastar, Dantewara (C.G)
	Vs.
RESPONDENT	State of Chhattisgarh through P.S. Kukanar, Distt. Dantewara (South Bastar) (C.G)

DB: Hon'ble Shri L.C. Bhadoo,
Hon'ble Shri Sunil Kumar Sinha, JJ,

Appearance:

Ku. Sharmila Singhai, counsel for the appellants.

Shri Akhil Mishra, Panel Lawyer, for the State.

Cr.A. No. 26 of 2006

DB: Hon'ble Shri L.C. Bhadoo,
Hon'ble Shri Sunil Kumar Sinha, JJ,

ORAL JUDGMENT
(14.9.2007)

The following judgment of the Court was delivered by

Sunil Kumar Sinha, J,

(1) Criminal Appeal No.26/2000 filed by accused appellant Shankar @ Tunnu, Cr.A.No.27/ 2006 filed by Santu @ Motu and Cr.A.No.28/2006 filed by Sukdeo @ Gonga are arising out of the same judgment passed in Sessions Trial No.303/2005, therefore, they are being disposed off by this common judgment.

(2) These appeals are directed against the judgment of conviction and order of sentence dated 31 December, 2005 passed by the Sessisons Judge, Jagdalpur (Bastar) in S.T.No.303/2005, whereby the said Court after holding the appellants guilty for the offence punishable u/s 302 read with section 34 & section 201 I.P.C., sentenced them to undergo imprisonment for life and R.I. for 3 years with a further stipulation that the sentence awarded u/s 201 IPC shall be deemed to be adjusted in the sentence of life imprisonment.

(3) The case of the prosecution is that on 18.5.2005 at about 2.40 p.m., the mother of the deceased namely Setobati lodged a merg intimation (Ex.P.16) in the police station that on 16.5.2005, the deceased namely Fooldas had gone to Badhai-Tikarapara alongwith his wife to attend a marriage. On 17.5.2005 in the after noon, he returned back and after taking his meals, he again went to the place of marriage saying that he is going to bring back his wife. He did not return in the night. On 18.5.2005 at about 8 a.m., one Durbal Badhai came to her house and told that deceased Fooldas has committed suicide by hanging himself from a *Mahua* tree near the house of his father-in-law. On receiving such information, she went to the said place and saw the dead body of her son. In the merg intimation, it has been mentioned that while lodging such intimation she was accompanied by the wife of the deceased namely Foolmati (P.W.2), Navi Singh & Fool Chand. After receiving such information, the Station House Officer left for the place of occurrence, gave notice to the *Panchas* under Ex.P.17,

merg intimation, the first information report Ex.P-9 was registered by the S.H.O.

(4) After completion of the investigation, charge sheet was filed in the court of Judicial Magistrate, First Class, Jagdalpur, who in turn committed the case to the Court of Sessions Judge, Jagdalpur where the trial was conducted. The learned sessions Judge after completion of the trial convicted and sentenced the appellants as aforementioned. The conviction of the appellants is based upon the sole testimony of P.W.2 Foolmati, who is the wife of deceased.

(5) Learned counsel for the appellants argues that Foolmati (P.W.2) being the wife of deceased is an interested witness. She also argued that apart from this, even otherwise also her evidence is not reliable as there are many material discrepancies in her evidence as also in her conduct.

(6) On the other hand, learned State Counsel opposes these arguments and supports the judgment of conviction and order of sentence passed by the trial Court.

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(7) We have heard learned counsel for the parties at length and have also perused the records of the Sessions Case.

(8) Admittedly, the learned trial Court has relied on the sole testimony of P.W.2 Foolmati (wife of deceased). She has deposed that her husband Fooldas was murdered by Dhunu, Motu & Gonga (all the appellants). She has deposed that she had gone to her parents place alongwith her husband and when they were returning from her parents place, on the way, they had stayed in the house of Dhunu for some time, where her husband had asked for *Salfi* (an intoxicant juice extracted from a tree) from Dunu on which Dhunu started abusing him and thereafter, Dhunu pressed the neck of her husband and he also kicked on his testicles, due to which, her husband fell down on the ground. She has further deposed that her husband was beaten by Shankar @ Dhunu, Santu @ Motu and Sukdev @ Gonga and all the three had assaulted him. She has further stated that after seeing the assault, she ran away from the place of occurrence. In para 2 of her examination-in-chief, she has deposed that she hided herself behind a Banyan tree and saw that all the accused persons took

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prepared inquest on the body of deceased under Ex.P.18 and sent the body for Postmortem examination under Ex.P.19 to Primary Health Center, Tongpal. One pair of slippers, one red shirt and one red coloured Topy, were seized from the place of occurrence under Ex.P.20. The site plan was prepared under Ex.P.22. The postmortem was conducted by Dr.L.L. Dhankar (P.W.5), who prepared his report under Ex.P.7. According to the postmortem report, both the eyes of the deceased were closed, face was congested, tongue was protruded out from the mouth, water mixed blood (fluid blood) was coming from the nostrils, foul smell was coming from the body as the decomposition has started, abdomen was swollen, both the hands were smeared with dark coloured dried blood, Penis was swollen and congested with redness of prepuce and glans. Groin was red and congested. There was a ligature mark situated above the thyroid cartilage between the larynx and chin. There was a single knot in the loop. The ligature mark on the neck was 1" in breadth. He noticed the following injuries on the body:

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(1) An abrasion on the right forearm admeasuring 2" x ¼"

(2) An abrasion on the right fore arm admeasuring 1 ½" x ½"

(3) An abrasion on the right thigh admeasuring 1 ½" x ½"

(4) An abrasion on the left knee admeasuring 1" x 1"

(5) Another abrasion on the right knee admeasuring 1 ½" x ½"

(6) A contusion over the scrotum anterior aspect in size of 2 ½" x 2 ½". The outer portions of the injury i.e., the adjacent regions were congested & blackish in colour.

(7) A contusion on the right side of pubic region above the root of Penis admeasuring 2 ½" x 2 ½".

(8) Another contusion on the ventral portion of Penis admeasuring 1" x 1".

All the injuries were antemortem in nature. Injuries No.1 to 5 were caused by hard and rough object. Injury no.6 to 8 were caused by blunt weapon. According to him, all the injuries were caused within the duration of 35 to 37 hours from the time of postmortem. According to his opinion, cause of death was shock owing to kicks on the testicles. After receiving the postmortem report based on

the body of her husband to the agricultural land of her father and they hanged the body from a tree with the help of a *Gamcha*. She further deposed that due to fear, she did not disclose this story to anybody and she returned back to her house. In para 3 of her examination, she has deposed that after two days of the said incident, she had gone to the Police Station and had disclosed the story there. She has also deposed that Kotwar namely Balsingh, Mitu, Chaitu and others had also gone to the Police Station and the police had prepared some papers, on which, her signature was taken. In Para 5 of her cross examination, she has admitted that there are many houses situated near the house of accused persons. She has also admitted that when the accused persons were beating her husband, she did not raise alarm. She has further admitted that when she ran away towards Banyan tree, she saw that her husband was being taken by the accused persons and at that time also she did not raise alarm. She has admitted that the river, near which the tree is situated, is at a distance of 3 furlongs from the place of occurrence. In Para 6 of her cross examination, she has admitted that on the next day her mother-in-law Saito Bai has gone to lodge the report in the police station but she had not disclosed the story to her. In addition to this, she specifically stated that she herself had gone to police station where she had disclosed the story. In a suggestion that she disclosed the story after 5 days of the incident, she denied this fact and has asserted that she has disclosed the story after two days of the incident.

(9) Learned counsel for the appellants, vehemently argued that the contents of the merg intimation, Ex.P.16, would show that in the 9th column which is for recording description, it has been mentioned that the maker of the merg intimation was accompanied by Foolmati (P.W.2), Navi Singh, and Fool Chand who was the village Kotwar. This intimation was lodged on 18.5.2005, therefore she argued that if P.W.2 was in fact an eye witness to this incident, she would have disclosed the story to the Police at the earliest opportunity or atleast she would have disclosed the story to her mother-in-law so that her mother-in-law would have stated all these things in the merg intimation.

(10) We have carefully considered these arguments advanced by learned counsel for the appellants. In deed, in the column of description, it has been mentioned that Foolmati had also accompanied the mother-in-law to the Police station while she had gone to lodge the merg intimation vide Ex.P.16. If she was present there and she had accompanied the mother in law to the Police Station, it would have been a natural conduct of this witness that either she would have disclose the story to Police or she would have told to the mother-in-law so that a report to this extent would have been lodged in the police station. Not making any disclosure at the time of lodging of the merg intimation, which was the first opportunity to this witness, creates a doubt on the credibility of this witness. Not only this, if we look into the notice (Ex.P.17) u/s 175 Cr.P.C., in which, the investigating officer has written the names of family members of the deceased and has taken their signatures on the notice, the name of wife of deceased i.e., Foolmati (P.W.2) is also mentioned at Serial No. 3 in the list of family members of the deceased and there is a thumb impression also. This shows that she was present at the time of issuance of Notice (Ex.P.17), which was prepared on 18.5.2005. This was the second opportunity for Foolmati (P.W.2) to disclose to the Police Officer that she knows about the incident, but she did not disclose the incident to the Police Officer at that time also. Apart from that, if we look into the contents of the inquest (Ex.P-18) prepared on 18.5.2005, in this also, the presence of P.W.2 is recorded. In the last column of the inquest, it has been mentioned that after identification etc., and after completion of formalities, the Investigating Officer, according to his own opinion and on the opinion of Panchas and other persons present there, did not come to a final conclusion and all decided to send the body for postmortem for further investigation. This was another opportunity to P.W.2 to disclose the incident, but at this time also she had not disclosed the incident to the police officer during the inquest.

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(11) Besides the above, if we look into the evidence of investigating officer A.S.I., Shivaram Dubey (P.W.7), it would appear vide para 5 of his evidence that he had recorded the statement of Foolmati on 22.5.2005 u/s 161 Cr.P.C. and on that

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day, for the first time she disclosed that she had witnessed the incident on 18.5.2005 that her husband was assaulted by the 3 appellants. This late disclosure makes two things very clear, firstly, she had not disclosed the fact for a period of about 5 days and secondly she gave false statement that on the 2nd/3rd day of the incident, she had gone to the police station and had disclosed all the facts to the police and at that time she was accompanied by Kotwar Balsingh, Meetu and Chaitu etc. If she would have disclosed all these things after two days of the incident as deposed by her, there was no reason with the police officer not to record her such statement and to go on investigation on the said line. More over, the investigating officer has also not deposed that after two days of the occurrence, this witness P.W.2 had disclosed about the incident in the police station. Admittedly, this witness is the wife of the deceased and her evidence is to be scrutinized with great care and circumspection. If we look into her entire evidence and appreciate the same in light of the other evidence available on record, we find that in fact, there are many discrepancies in her evidence and for the reasons stated in the foregoing paragraphs, her sole testimony cannot be relied on to warrant the conviction of the appellants.

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(12) In our considered opinion, the trial Court committed an error of law in relying on the sole testimony of this witness while convicting the appellants u/s 302/34 and section 201 of I.P.C.

(13) For the foregoing reasons, the conviction and sentence awarded by the trial Court deserve to be set aside and the appeals deserve to be allowed. Accordingly, the appeals are allowed. The conviction and sentence imposed against the appellants are set aside. The appellants are acquitted of the charges framed against them. The appellants are reported to be in jail. They be released forthwith, if not required in any other case.

Sd/-
L.C.Bhadoo
Judge

sd/-
Sunil Kumar Sinha
Judge

/Rao/